In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FRANK R. MOORE, AS UNITED STATES collector of internal revenue, first district, State of New York, plaintiff in error, v. MAX RUCKGABER, SR., AS SOLE EXECUTOR of the last will and testament of Louisa Augusta Ripley-Pinede, deceased.	No. 295.
FERDINAND EIDMAN, UNITED STATES collector of internal revenue for the third district of New York, plaintiff in error, v. MIGUEL R. MARTINEZ, AS ANCILLARY administrator with the will annexed of Salvador Elizalde, deceased.	No. 287.

BRIEF FOR THE UNITED STATES.

STATEMENT.

CASE NO. 295.

The original action was brought by the defendant in error, as sole executor of the last will and testament of Louisa Augusta Ripley-Pinede, against the collector of internal revenue of the first district of New York, to recover back the Federal legacy tax collected under

the war-revenue act of June 13, 1898 (30 Stat., 464). A demurrer to the complaint was overruled, judgment taken, and the case carried on error to the circuit court of appeals, which certified to this court two questions of law arising out of the facts stated in the record.

It appears that on September 25, 1898, Louisa Augusta Ripley-Pinede died at Zurich, Switzerland, leaving a considerable personal estate located in New York and a will executed in New York. At the time of her death the testatrix was a nonresident of the United States, "being then, and having been for at least eight years immediately preceding that time, domiciled in and a permanent resident of the Republic of France."

The will of the testatrix was dated November 6, 1890, and was executed in the city of New York, where the testatrix was at that time sojourning. By this will she bequeathed "all the personal property of every kind *in the United States of America* which may belong to me at the time of my death" to her daughter, Carmela von Groll, wife of Lieut. Max von Groll, then residing at Ulm, in Wurtemberg, Germany, and she appointed as executors her daughter, Carmela von Groll, Whitelaw Reid, of New York, Charles Allen, of Boston, and Max Ruckgaber, sr., of Brooklyn.

On February 17, 1899, this will was duly admitted to probate by the surrogate's court of Kings County, N. Y., and on this day the daughter, Whitelaw Reid, and Charles Allen having renounced their appointments as executors, and Max Ruckgaber, sr., having

duly qualified, letters testamentary were issued to him *as sole executor.*

The personal property of the testatrix, located in the United States at the time of her death, as valued by the appraisers appointed by the court, was as follows:

Bonds and coupons of divers American corporations	$90,134.27
One share of stock of the Tribune Association, a New York corporation	7,500.00
An indebtedness from the firm of Schulz & Ruckgaber, of New York City	8,036.43
Total	105,670.70

The amount of the debts of the testatrix, the executor's commissions, and general expenses of administration, amounted to $2,246.70, leaving a balance passing to the sole legatee under the will of $103,424.

Upon this the Federal legacy tax assessed and charged amounted to $1,551.36, to recover back which the original suit was brought.

The questions of law certified to this court are as follows:

> (1) Can the said personal property of the nonresident testatrix, Louisa Augusta Ripley-Pinede, actually located within the United States at the time of her death, September 25, 1898, be deemed to have a situs in the United States for the purpose of levying a tax or duty upon the transmission or receipt thereof under sections 29, 30, and 31 of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898?
>
> (2) Was the transmission or receipt of the

said personal property of the nonresident testatrix, Louisa Augusta Ripley-Pinede, which was actually located in the United States at the time of her death, September 25, 1898, subject to taxation under sections 29, 30, and 31 of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898?

CASE NO. 287.

The original action was brought by the defendant in error, as ancillary administrator with the will annexed of Salvador Elizalde, deceased, against the collector of internal revenue for the third district of New York, to recover back the Federal legacy tax collected under the war-revenue act of June 13, 1898 (30 Stat., 464). A demurrer by the Government to the complaint was overruled, judgment taken, and the case carried on error to the circuit court of appeals, which certified to this court two questions of law arising out of the facts stated in the record.

It appears that on April 27, 1899, Salvador Elizalde, a nonresident alien, a subject (Cuban) of the King of Spain, who had never resided within the United States, died in Paris, France, leaving a large personal estate in the hands of his agents in New York and a will in the Spanish language, executed in Paris in 1891, pursuant to the laws of Spain. The personal estate left by the decedent was in charge of P. Harmony's Nephews & Co., 35 South William street, New York City, and consisted of the following Federal, municipal, and corporate securities, as inventoried under the administration hereinafter referred to:

Par value.	Description of securities.	Form.	Redeemable.	Rate of interest.	April 27, 1899, price.	Amount.
				Per cent.		
$54,400	United States 4 per cent bonds of 1907	Registered	After July, 1907	4	112½	$61,200
2,000	New York City "Croton Water Main Stock"	do	Nov. 1, 1900	7	105½	2,105
5,000	New York City "Additional New Croton Aqueduct."	do	Aug. 1, 1900	6	102½	5,125
22,000	Brooklyn "Permanent Water Loan"	do	July 1, 1899	6	100	22,000
1,000	do	do	Jan. 1, 1902	6	107½	1,075
2,000	Brooklyn "Public Parks"	do	July 1, 1924	6	147½	2,950
17,000	Illinois Central (Mid. Div.) 5 per cent bonds	do	Aug. 1, 1921	5	117	19,890
30,000	New York, Lackawanna and Western, first mortgage 6 per cent bonds of 1921.	do	Jan. 1, 1921	6	134	40,200
10,000	Harlem River and Port Chester first mortgage 6 per cent bonds.	do	Oct. 1, 1903	6	111	11,100
25,000	New York Central and Hudson River Railroad first mortgage bonds.	do	Jan. 1, 1903	7	114½	28,625
11,000	New York and Harlem Railroad Company first mortgage 7 per cent bonds.	do	May 1, 1900	7	107	11,770
26,000	Morris and Essex Railroad Construction mortgage 7 per cent bonds.	do	Oct. 1, 1901	7	108½	28,210
25,000	Albany and Susquehanna Railroad first consolidated mortgage bonds.	do	Apr. 1, 1906	6	115	28,750
25,000	Utica, Clinton and Binghamton Railroad first mortgage 5 per cent bonds.	Bearer	July 1, 1939	5	121	30,250
255,400						293,250

Salvador Elizalde left an only son, Arturo Elizalde, born in Cuba, who is a nonresident alien and a Spanish subject.

The will was filed and protocolized in the office of the Spanish consul in Paris, and thereby under the laws of Spain and the consular convention or treaty between Spain and France, Arturo Elizalde, the sole legatee under the will, became entitled to the possession and administration of all the personal property of the decedent. The will proposed to give all the personal property of the decedent to said Arturo, but, by the laws of Spain, only one-third of the property passed by the will and the remaining two-thirds passed to the son by and under the Spanish intestate law.

After the filing of the will in Paris, Arturo Elizalde, the sole heir and legatee, entered upon the administration of the decedent's personal estate, and appointed the defendant in error, Miguel R. Martinez, his attorney, for the purpose of receiving ancillary letters of administration, with the will annexed, in the State of New York, and such letters were issued to him by the surrogate of New York County. After receiving such letters, Martinez took possession of the securities. Upon the transmission of the legacy and distributive share to Arturo Elizalde, a Federal legacy tax, amounting to $4,293.76, was assessed and paid under protest. To recover this back the original suit was brought.

The questions of law certified are as follows:

> 1. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act

of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon the passing of any legacy arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States, and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile, pursuant to the laws thereof, by which he gives all his property to a nonresident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

2. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon the passing of any distributive share arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States, and who dies without the United States, in the year 1899, intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a nonresident alien, and who leaves certain personal property within the State of New York exceeding $10,000 in value.

ARGUMENT.

I.

In case No. 295, the court will observe:

First. That the will was made in New York, according to the laws of that State;

Second. That it bequeathed only personal property within the United States;

Third. That the will was probated in New York, letters testamentary issued there, and the administration of the estate conducted entirely under the laws of New York and by a sole executor residing there; and,

Fourth. That the only property which passed under the will was property located in New York.

Such being the circumstances, will, property, and executor all subject to and regulated by the laws of New York, the sole circumstance relied on to exempt this legacy from Federal taxation is that the testatrix at the time of her death was a nonresident of the United States, being at that time and for eight years preceding "domiciled in and a permanent resident of the Republic of France." At the same time it is to be noted that she did not die in France, but at Zurich, in Switzerland. Her residence in France at the time of her death was an alleged legal status. The situation would have been the same if she had died in New York, where her will had been made and her property was located, provided she still claimed to be a nonresident of the United States and *domiciled* in France.

II.

The exemption from the Federal legacy tax claimed for the transmission or receipt of the personal estate located in the United States of a non-resident decedent, is largely based upon the application, in the construction of sections 29 and 30 of the war-revenue act of

June 13, 1898, of the ancient maxim *mobilia sequuntur personam*. It is evidently to this that the circuit court of appeals refers in propounding the primary question submitted in No. 295, namely:

> Can the said personal property of the non-resident testatrix, Louisa Augusta Ripley-Pinedo, actually located within the United States at the time of her death, September 25, 1898, *be deemed to have a situs in the United States* for the purpose of levying a tax or duty upon the transmission or receipt thereof under sections 29, 30, and 31 of the act, etc., approved June 13, 1898?

With respect to the limited operation of this maxim at present, under modern conditions, I can not do better than to quote the language of this court, speaking by Mr. Justice Gray, in the case of *Pullman Palace Car Company* v. *Penna.* (141 U. S., 18, 22):

> No general principles of law are better settled or more fundamental than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since

the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*—the law of the place where the property is kept and used. (*Green* v. *Van Buskirk*, 5 Wall., 307, and 7 Wall., 139; *Harvey* v. *Rhode Island Locomotive Works*, 93 U. S., 664; *Harkness* v. *Russell*, 118 U. S., 663, 679; *Walworth* v. *Harris*, 129 U. S., 355; Story on Conflict of Laws, sec. 550; Wharton on Conflict of Laws, secs. 297–311.) As observed by Mr. Justice Story in his commentaries just cited, "although movables are for many purposes to be deemed to have no *situs* except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner, and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax. (*Lane County* v. *Oregon*, 7 Wall., 71, 77; *Railroad Co.* v. *Pennsylvania*, 15 Wall., 300, 323, 324, 328; *Railroad Co.* v. *Peniston*, 18 Wall., 5, 29; *Tappan* v. *Merchants' Bank*, 19 Wall., 490, 499;

State Railroad Tax Cases, 92 U. S., 575, 607, 608; *Brown* v. *Houston*, 114 U. S., 622; *Coe* v. *Errol*, 116 U. S., 517, 524; *Marye* v. *Baltimore and Ohio Railroad*, 127, U. S., 117, 123.)

In the case of *Adams Express Co.* v. *Ohio* (166 U. S., 185), in which was involved the situs for taxation of the intangible property of an express company, Mr Justice Brewer, speaking for the court, in denying the petition for a rehearing, said (p. 224):

> It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was "*mobilia personam sequuntur*," but that maxim was never of universal application, and seldom interfered with the right of taxation. (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S., 18, 22.) It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 of intangible property for purposes of taxation was changed from the State of New York to that of New Jersey.

Again, page 225:

> In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such

burden of taxation as a fair distribution of the actual value of their property among those States requires.

In the recent case of *Bristol* v. *Washington County* (177 U. S., 133), in which the court held that the personal property of a citizen of and resident in one State, invested in bonds and mortgages in another State, is subject to taxation in the latter State, the court, speaking by Mr. Chief Justice Fuller, quotes the following language from the opinion below (pp. 141, 142):

> "For many purposes the domicil of the owner is deemed the *situs* of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual *situs* of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which can not be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its *situs* where it is owned—at the domicil of the creditor. The creditor, however, may give it a business *situs* elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business." After citing *Catlin* v. *Hall*, 21 Vermont, 152; *People* v. *Smith*, 88 N. Y., 576; *Wilcox* v. *Ellis*, 14 Kansas, 588; *Board of Supervisors* v. *Davenport*, 40 Illinois, 197, and many other cases, the

opinion continued thus: "The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Now, here was property within this State, not for a mere temporary purpose, but as permanently as though the owner resided there. It was employed here as a business by one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent principal. It was exclusively under the protection of the laws of this State. It had to rely on those laws for the force and validity of the contracts on the loans, and the preservation and enforcement of the securities. The laws of New York never operated on it. If credits can ever have an actual *situs* other than the domicil of the owner, can ever be regarded as property within any other State, and as under obligation to contribute to its support in consideration of being under its protection, it must be so in this case."

III.

The cases to which I have referred involved the direct taxation of personal property where located, although the owner was domiciled in another State, but the same disregard of the old maxim referred to obtains in the levying of inheritance taxes by the various States of the Union. It is unnecessary for me to refer to the provisions of the inheritance tax laws of the several States. They will be found in the appendix to Dos Passos on Inheritance Tax Law, second edition. I

know of no State levying a legacy tax which does not impose the tax upon the personal property of a nonresident decedent which is located in the State. Respecting the liability of such property or its transmission to taxation, Dos Passos says (p. 167, sec. 47):

> In some States this result has been reached either by a construction placed upon the statutes on ground of public policy, favoring equality, and to prevent unjust discrimination between estates of resident and nonresident decedents, and in others by express legislation, and the tax has been imposed upon both the real and personal property, tangible and intangible, of nonresident or alien decedents actually within the taxing State at the time of death, whether or not there be legatees or heirs within the State. In such cases the theory seems to be that for the purposes of this tax the succession is deemed to take place under the law of the taxing State, in reaching which result the courts have leaned toward the actual or real *situs* of property, having a visible and tangible existence, rather than to the mere domicile of the owner (referring to cases).

In the State of New York it was held that the collateral inheritance-tax act of 1885 did not apply to the property of a nonresident decedent located within the State, but this was because of the peculiar language of the act, the phraseology of which, as the court said, was "singularly involved and obscure." (See *Matter of Euston*, 118 N. Y., 174, 177.) The act as originally passed provided that "all property which shall pass by

will or by the intestate laws of the State, from any person who may die seized or possessed of the same *while being a resident of the State*, etc.," and a divided court held, in the case which I have just cited, that this language restricted the tax to property passing from a decedent who was a resident of the State.

In 1887 the act was amended so as to provide that all property "which shall pass by will or the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, *or if such decedent was not a resident of this State at the time of death, which property, or any part thereof, shall be within this State*," *and* the court of appeals of New York held, in the *Matter of the Estate of Romaine* (127 N. Y., 80), that the personal property of a nonresident intestate, which was located in New York, was liable to taxation under the act. I quote from the opinion of the court, bottom page 86:

> That the legislature had the power to do this can hardly be questioned. (*Matter of McPherson*, 104 N. Y., 306.) As was said by Judge Story, when writing upon this subject: "A nation within whose territory any personal property is actually situated has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." (Conflict of Laws, sec. 550.) In *People ex rel. Hoyt* v. *Commissioners of Taxes* (23 N. Y., 224, 228), Judge Comstock quotes with approval the foregoing extract, and adds: "I can think of no more just and appropriate exercise of the sovereignty of a

> State or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of government and law. Accordingly there seems to be no place for the fiction of which we are speaking (*mobilia personam sequuntur*) in a well-adjusted system of taxation." (See, also, *Guillander* v. *Howell*, 35 N. Y., 657; *Graham* v. *First National Bank of Norfolk*, 84 id., 393, 401; *Catlin* v. *Hull*, 21 Vt., 152; Dos Passos on Collateral Inheritance, 37, 92.)

The court in its opinion also cites *State* v. *Dalrymple*, 70 Md., 294; *Alvany* v. *Powell* 2 Jones Eq. (N. C.), 51.

IV.

I concede that in the case of *Thompson* v. *Advocate-General* (12 Clark & F., 1—decided in 1845) it was held that the English legacy act did not apply to property within Great Britain of a nonresident decedent; but I am safe in saying that the States of the Union have declined to follow the English rule that personal property has no *situs* of its own and therefore follows the domicil of its owner, but on the contrary have taken the sensible view that personal property within a State of a person living abroad, which receives the benefit not only of the protection of its laws, but of the prosperity of its people, ought, on its transmission after death, to bear the same burden and pay the same tax that would be imposed if it belonged to a resident.

It is contended on the other side that, since we got the idea of our legacy tax law from England, we must

in its construction and application follow the English authority to which I have alluded; but I submit that the war-revenue act of 1898 was passed after the enactment by many of the States of the Union of inheritance tax laws, all of which were made applicable to the personal property within the State of nonresident as well as resident decedents. These laws are referred to in the opinion of this court in *Magoon* v. *Illinois* (170 U. S., 283), decided before the war-revenue act of 1898 was passed. The principles upon which these laws were based are stated by this court, speaking by Mr. Justice McKenna, as follows (p. 288):

> (1) An inheritance tax is not one on property, but one on the succession.
>
> (2) The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege—and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation.

If in taking the personal property within a State of a nonresident decedent a right or privilege is enjoyed which the State may tax by annexing a condition, why is there not such a transmission or passage of that property as to bring it within the operation of the Federal legacy tax?

In the case of *United States* v. *Perkins* (163 U. S., 625), it was held that property bequeathed to the

United States could be lawfully included in the New York inheritance tax. In the opinion, delivered by Mr. Justice Brown, it was said (p. 628):

> That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other States.

Yet, again (p. 630):

> We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.

In the case of *Knowlton* v. *Moore* (178 U. S., 41), Mr. Justice White, speaking for the court, said:

> The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate.

In the case of *Plummer* v. *Coler* (178 U. S., 115), all the authorities, State and Federal, bearing upon the nature of inheritance-tax laws are reviewed for the purpose of determining whether the portion of an estate in New York invested in United States bonds was taxable under the inheritance-tax law of that State, and this court, speaking by Mr. Justice Shiras, reached the following conclusion (p. 134):

> We think the conclusion fairly to be drawn from the State and Federal cases is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing the tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing, and that the incidental fact that such property is composed, in whole or in part, of Federal securities does not invalidate the tax or the law under which it is imposed.

V.

Such being the law of the States, personal property being taxed where located, irrespective of the domicile of its owner, and the inheritance-tax laws of the States being applied to the property within the States of non-resident as well as resident decedents, upon the theory that in the transmission or receipt of such property a privilege is enjoyed under the law of the State, I submit that it was the intention of Congress, in enacting the Federal legacy tax law of 1898, to reach and tax the passage of personal property occasioned by death in every case where such transmission is made taxable by a State law, save where the Federal law itself makes specific exemptions. If there was a transmission or receipt of property within a State as the result of death, so that the State could tax the privilege enjoyed in such transmission or receipt, then there was a passage of the property within the United States ample to warrant the Federal exaction. I think it clear that Congress acted upon this conviction and with the intention of reaching every transmission or

passage of personal property within the United States, whether by will or in case of intestacy, or as a gift *inter vivos* to take effect upon death. An examination of the language of the act, with the amendments which have been made since its passage, will confirm this conclusion.

Section 29 provides:

> That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property * * * passing, after the passage of this act, from any person possessed of such property, either by will or the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, etc., shall be, and hereby are, made subject to a duty or tax to be paid to the United States, as follows, etc.

It is to be observed that it is not the personal property referred to which is made subject to the tax, but the administrator, executor, or trustee who has the property in charge or trust.

Every person is made subject to the tax who has in charge or trust, whether as administrator, executor, or trustee—

Any legacy or distributive share arising from personal property passing—

(*a*) Either by will, or

(*b*) By the intestate laws of any State or Territory; or,

Any personal property or interest therein transferred by deed, grant, bargain, sale, or gift, made or intended to take effect after the death of the grantor.

The statute does not provide that the legacy must pass from any person *residing in the United States* possessed of such property, etc. It applies to all legacies, distributive shares, or gifts to take effect after death, which are held in charge by administrators, executors, or trustees within the United States. The law is framed so as to reach every case of the passage of personal property within the United States from the dead to the living, whether by will, or as a result of intestacy, or by gift to take effect after death.

That Congress intended by the language in section 29 to reach every personal estate within the United States, whether of a resident or a nonresident decedent, is shown conclusively by the amendments made to section 30 by the act of March 2, 1901 (31 Stat., 948).

As pointed out in *Knowlton* v. *Moore* (178 U. S., 41, 69), Congress had before it in enacting the present law, not the act of 1864 as amended by the act of 1866, but the original act of 1864. The original act of 1864 contained in section 125 (now section 30) a method for the collection of the tax, and provided that every executor, administrator, or trustee, before payment and distribution, should pay to the collector or deputy collector "of the district of which the deceased person was a resident" the amount of the duty or tax assessed. In the *Hunnewell case* (13 Fed. Rep., 617) this provision was referred to in support of the conclusion that the act of 1864 was only intended to

reach the estates of resident decedents. But since that time the imposition of inheritance taxes has become general throughout the States, and all such duties have been imposed upon the personal estates of nonresident as well as resident decedents. The Commissioner of Internal Revenue, in order to carry out the obvious intention of Congress to make this tax a general and uniform one, so as to reach all personal property passing from the dead to the living within the United States, in his report for 1900 made the following recommendation (see Treasury Annual Report, 1900, p. 617):

> I recommend that the following amendments to the law relative to the tax on legacies be made:
>
> That in section 29, act of June 13, 1898, there be inserted, after the word "otherwise," the words "including persons residing abroad."
>
> That in section 30, after the words "shall pay to the collector or deputy collector of the district of which the deceased person was a resident," there be inserted the words "*or in which the property was located, in case of nonresidents.*"
>
> These amendments, if made, will provide that estates in this country of persons residing abroad at time of their death shall be taxed the same as estates of persons residing in this country. There should be no unjust discrimination in favor of persons residing abroad whose property is in this country and distributed under our laws. This office has ruled that the tax accrues on legacies in such cases (Treasury

Decisions, 1899, No. 21052), but it would be preferable to have the law specifically so declare, as it has been contended otherwise.

In response to this recommendation, Congress did not insert in section 29 after the word "otherwise" the words "including persons residing abroad," for the very obvious reason that the language of that section was already comprehensive enough. But it did, in section 30, make the amendment suggested, in order to correct the oversight in the administrative portion of the act. So that section 30 now provides (see 31 Stat., 948) that every executor, administrator, or trustee, before payment and distribution, "shall pay to the collector or deputy collector of the district of which the deceased person was a resident, *or in which the property was located in case of nonresidence*, the amount of the duty or tax assessed, etc."

If Congress had amended section 29 as suggested, it might be urged with force that the original language imposing the tax was not broad enough to reach the personal estates of nonresident decedents. But Congress, by declining to amend this section, and by correcting the administrative machinery in the way indicated, has shown conclusively that it intended to subject to this tax the personal estate of nonresident as well as resident decedents.

VI.

But it is urged upon the authority of the case of *United States* v. *Hunnewell* (13 Fed. Rep., 617), that since the law would not reach the personal estate of the

nonresident decedent if she had died intestate, it can not be construed so as to reach the personal estate which she bequeathed by will. Before discussing the *Hunnewell case*, it may be well to call attention to the peculiar facts in No. 295. I suppose counsel would hardly contend that if Madame Ripley-Pinede had left with her agents in New York a deed of trust executed in New York and intended to take effect upon her death so as to dispose of her property in the precise manner in which she did by will, that the passage of the property in that way would not be subject to the legacy tax. And yet she did substantially the same thing. This is not a case of a foreign will, upon which ancillary administration was obtained. The testatrix chose to invest her property in New York. It was not there casually. It was kept there for investment because it was to her interest to have it held and managed in New York. Under all the decisions of our courts that property was subject to taxation in New York. She had a right to make her will abroad. It is claimed she was a resident of France, although she died in Switzerland. But for her own reasons, and probably because she trusted the laws of New York more than the laws of France, she made her will in New York, and she appointed citizens of the United States as her executors. She intended that that will should be fully administered in New York, and it has been so administered. It can not be denied that this will, made and administered in New York, obtained its validity and virtue under the laws of New York.

Evidently, then, whatever passed under this will passed clearly by virtue of the laws of New York; and how absurd it is to rely in this case upon the old maxim *mobilia personam sequuntur*, when the testatrix herself, by her entire course of conduct with reference to her property within the United States, showed clearly that she intended the property to remain here, subject to the laws of this country and not to follow her to France or Switzerland or wherever she might go.

VII.

But to return to the *Hunnewell case*. That case was decided in 1882, long after the act of 1864 had been repealed. It is fair to say it was not elaborately argued. The opinion occupies a little over a page and three cases are cited. The reason given for the decision is that, if the decedent had died intestate, her son would not have taken a distributive share "by the intestate laws by any State or Territory," but, if at all, by the law of France, the domicile of the decedent; and that if the act did not make the duty payable when the decedent died intestate it would not be payable when she died testate. This argument might have been extended further to gifts by saying that if the act did not make the duty payable when the nonresident decedent died intestate, neither would it be payable if he had made a gift by deed or grant, to take effect upon his death. And yet the English courts, while adhering to *Thompson* v. *Advocate-General* (12 Clark & Fin., 1), where the nonresident dies leaving a foreign will, have held, in a number of cases, that a succession

created by a gift of property in England intended to take effect after death is subject to the tax. With respect to this Hanson says (Hanson's Death Duties, bottom p. 531):

> With regard, however, to personal property of which the owner disposes, by deed or instrument *inter vivos*, so as to create a succession, the law of the settler's domicile can have no effect in determining the liability to duty which must, under such circumstances, depend upon the "forum of administration" of the settlement. When this forum is English, e. g., in all cases where the trustees are resident in this country and the settlement is in English form, succession duty will be payable. And this rule has not only been recognized with regard to settlements of personal property created by deed, but has also been extended to cases of succession arising under trusts created by direction of a will.

Whatever may be the law in England, in this country the matter of descent and distribution is regulated by statute, and no property within a State can pass to legatees or distributees except by virtue of and in compliance with the law of the State. This applies to all property, the property of aliens as well as the property of residents. In this connection I beg to refer to the early case of *Mager* v. *Grima* (8 How., 490), growing out of the imposition by the law of Louisiana of a tax of 10 per cent on legacies, when the legatee was neither a citizen of the United States nor domiciled in that State. The act was assailed upon the ground

that it was repugnant to the Constitution of the United States. But the judgment of the State court sustaining the law was affirmed, Mr. Chief Justice Taney, speaking for the court, saying (p. 493):

> Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament or by inheritance, and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. *The right to take is given to the alien, subject to a deduction of 10 per cent for the use of the State.*

The personal property in New York of persons residing abroad is as fully within the dominion of that State as that of persons residing there. The broad power referred to by Chief Justice Taney exists there just as it did in Louisiana. New York has by its law regulated the descent and distribution of such property.

It has given effect to the wills of persons dying abroad upon certain conditions and has directed that property of aliens shall descend in the manner provided by their own law upon certain conditions. But these provisions are the law of the State of New York and the property descends by virtue of that law. In every case the condition is annexed that the property shall contribute to the State by the payment of an inheritance tax. The very fact that such a condition is annexed, shows that there is a passage of the property from the dead to the living under the law of New York. The law of New York gives effect to foreign wills upon certain terms and conditions. When these are complied with, the force of the law of New York flows into the foreign will, giving it strength and effect upon the property located in New York. So in the case of the intestacy of an alien leaving property in New York. After a compliance with certain conditions the law of New York provides that his property shall be disposed of and distributed in a certain way. It adopts the law of his domicil as the rule, but that law has no force of its own in New York. It is the New York law which has force, and so there is a New York intestate law in the case of foreigners as well as of citizens.

Since the law of New York regulates descent in the case of the intestacy of a nonresident as well as of a resident, I submit that Congress never intended to restrict the phrase "the intestate laws of a State" to those laws alone which deal with the intestacy of

residents. It meant to include all laws regulating descent in cases of intestacy, regardless of the domicil of the decedent.

VIII.

No. 295 is not a case of ancillary administration under a foreign will, but No. 287 is, and in support of my contention that the law of New York regulates the transmission of the estates of nonresidents as well as residents, let me refer to the statutes governing foreign wills.

Section 2694 provides that the validity and effect of a testamentary disposition of real property, and the manner in which real property descends where it is not disposed of by will, are regulated by the laws of the State without regard to the residence of the decedent. It then provides:

> *Except where special provision is otherwise made by law*, the validity and effect of the testamentary disposition of any other property situated within the State, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the State or country of which the decedent was a resident at the time of his death.

The New York law gives force and effect to the intestate law of the country of domicil, "except where special provision is otherwise made by law," thus asserting the entire dominion of New York over the subject. This is the intestate law of New York with respect to nonresidents, with the special exceptions indicated.

The succeeding provisions of this chapter relate to the administration of foreign wills through ancillary

letters. In order to carry such wills into effect administration must be taken out under the New York law and all the provisions of this chapter complied with.

Section 2700 directs the person to whom ancillary letters are issued, *unless otherwise ordered by the proper authorities*, to transmit the personal property of the decedent to the country where the principal letters were granted "to be disposed of pursuant to the laws thereof."

Section 2701 authorizes the proper courts of New York to direct the person to whom ancillary letters have been issued either to apply the assets to the payment of the decedent's debts within the State "*or to distribute the same among the legatees or next of kin, or otherwise dispose of the same as justice requires*"

Section 2702 applies to the person to whom ancillary letters have been granted, the general provisions of the laws of New York relating to executors or administrators.

All these provisions show conclusively that no personal property, whether the decedent was a resident or a nonresident of New York, can be transmitted to his legatees or distributees, except after a compliance with the laws of New York relating thereto. The executor, administrator, or trustee acts under the law of New York as a medium for passing such property from the dead to the living. Such transmission, in accordance with the laws of New York, is made taxable by the law of New York, and was intended to be reached by the Federal legacy tax.

IX.

It is urged on the other side that the law must be strictly construed in favor of the exemption or noninclusion of the personal property of nonresidents, and many authorities are cited. In view of the facts to which I have called attention, namely, that the maxim *mobilia personam sequuntur* has not been held to apply within the States either in the taxation of personal property or in the collection of legacy duties, and in view of the general and comprehensive language of the Federal legacy act, I submit that another rule of construction applies, which is thus stated in Cooley on Taxation, second edition, page 204:

> As taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; and it can not be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. (Citing many cases.)

The only doubtful words in this act are the words "the intestate laws of any State or Territory," and I submit that this phrase may be construed and should be construed so as to include every law of a State or Territory which deals with a case of intestacy, whether of a resident or of a nonresident. The court will not construe these words so as to limit the meaning to the laws defining descent in the case of intestacy of a resident, when there is a law of the State regulating descent where the intestate is a nonresident. Suppose the foreign rule of descent is adopted by the law of

New York, what Mr. Justice Miller said in the *Railroad Tax Cases*, (92 U. S., 612), applies: "But after all, the rule is merely the law of the State which recognizes it."

The construction contended for by the other side destroys the uniformity and equality of the law, for it exempts the transmission of certain personal property from the legacy tax. The States tax all personal property passing after death, regardless of the residence of the decedent. The United States may and ought to do the same. Here then is ground for invoking that other rule to which Mr. Justice White referred in *Knowlton* v. *Moore* (178 U. S., 41, 77):

> We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. (Citing cases.)

X.

To sum up: The right of property does not include the right to dispose of it after death. The power of transmitting property from the dead to the living is a creature of the State. Personal property, as well as real estate, is subject to the dominion of the State wherein located and can be disposed of after death only under and by virtue of its laws. The State which has control may regulate the transmission and annex such conditions as it sees fit. The conditions may affect the disposition of the property and may be made

dependent upon the status of interested parties either to the State or to one another. In other words, citizenship, domicile, relationship, may be used in determining how the property shall pass and what tax shall be imposed upon its transmission. The State may direct that the property shall pass according to relationship in in a fixed way, with no power to direct its disposition otherwise by will, or it may require a portion to pass in a fixed way and permit the decedent by will to control the disposition of the remainder, or it may permit the decedent to dispose of all by will. Again, if a will is permitted, the State may require it to be executed according to its own laws, or permit it to be executed in the manner prescribed by the laws of some other country. If the decedent left no will, the State may require the property to pass according to its own laws, or permit it to pass after the mode fixed by the laws of some other country. At the same time the State may in every case reserve to itself a portion of the personal estate, no matter what the domicil of the decedent was. Since the property in any and every event passes under the law of the State, the State may reserve to itself, in the way of an inheritance tax, a certain percentage of the estate, and only permit the remainder to pass to the legatees or distributees. I refer to all this simply for the purpose of pressing the point that in every instance there is a passage of the property by virtue of the law of the State. The fact that the New York law controls in the passage of the personal estate of nonresidents as well as residents is

conclusively shown by the fact that the New York law takes a part of the personal estate in every instance for its own use, permitting only the remainder to pass.

A reference to the laws of the different States of the Union will show a variety of provisions with respect to the descent of personal property, whether belonging to residents or nonresidents. Each State has felt free to regulate the matter for itself. I may submit to the court in a separate pamphlet a compilation of the laws of the leading States upon this subject.

What I desire especially to urge is that whatever rule may be applied to the personal estate of a nonresident, that rule obtains force and vigor alone from the law of the State which has dominion over the property. If the rule of a foreign country is adopted, it becomes to that extent the law of the State. The law of France has no force in New York unless New York adopts and makes it in a particular case the law of New York, and then it operates as the law of New York, not as the law of France. A foreign administrator has no authority to go into New York and simply by virtue of the letters issued to him abroad take possession of the personal property of a decedent and turn it over to the legatees or distributees. Before he can act as the medium of transmitting such property from the dead to the living he must seek the aid of the law of the State which has control of the property. Application must be made to the proper court for authority to take possession of the property, and a compliance had with all the conditions of the local law respecting the payment of local debts and taxes and the filing of accounts,

etc., before the property can be passed on to the legatees or distributees. When the property does finally pass on, whether by will or by the intestate laws, it passes after a full compliance with the local law and by virtue of that law.

CONCLUSION.

Considerations of public policy are urged by the other side. The taxation of the personal estate of nonresidents is denounced as unequal and unjust. It is urged in one of the briefs that this court institute reform by applying generally, in matters of taxation, the maxim so much relied on, *mobilia personam sequuntur*. Just how the court can do that is not explained. It is conceded that all the State laws imposing inheritance taxes reach the personal estate of nonresident as well as resident decedents. Will this court hold that those provisions are unconstitutional? If so, upon what ground? The court will have to upset a long line of decisions, beginning with *Mager* v. *Grima*, which I have quoted, in order to do that. Or will the court, in deciding this case, apply the "higher law" of *jus gentium* which is invoked, and hold not only that Congress did not intend to tax the transmission of the personal estate of nonresidents, but lacked the power to do so? And if so, upon what ground? If a State may tax the transmission or receipt of personal property within its borders belonging to a nonresident, may not the United States do the same thing? And why ought it not to do the same thing? Is there not a special reason why the United States should collect

this tax, even if the States did not? The persons who live and die abroad leaving personal estates here belong as a rule to one of two classes, either Americans who, for some reason, have renounced their country, or foreigners who prefer, for reasons of profit, to invest their estates here. In either case the stocks and bonds and personal property found in this country after the death of the nonresident, have been kept or placed here for investment because it was advantageous to do so. There is no country which offers such a field for profitable investment as this. It is most natural, therefore, that Americans who prefer to marry or move and live abroad should leave their wealth in the hands of agents here for investment; and the same is true of foreigners who desire to increase their fortunes by profitable investment. They send their money to agents here with authority to invest and reinvest it. Such property does not answer to the "*mobilia*" of the ancient maxim. It does not follow its owner. It is not like money or jewels. It stays here, it is put to use here, and from that use it grows and increases. It receives the protection of our Government and our law and reaps the benefit of the prosperity due to the enterprise and energy of our people. If there is any property which should be required to pay a contribution to the Government, it is such property. Its owner, instead of spending his money here, spends it abroad. We can't make him pay because he stays away; but we can make his personal property pay, especially when disclosed by death, for frequently he manages to conceal it up to that time.

In the case of aliens, it is peculiarly appropriate that their personal estates should be compelled to pay a contribution to the general Government, because they have at all times free access to its courts, and all the powers of the United States are at their disposal for the protection of their rights of property and person. They receive the benefit; let their estates bear at least a slight portion of the burden.

JOHN K. RICHARDS,
Solicitor-General.

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